At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brooklyn, New York, on the 24th day of February , 2023.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

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JASON ALOMAR,

Plaintiff,

Index No. 514021/2018

-against-

DECISION AND ORDER
MS #4, #5, #6, and #7

49-1146, LLC, ROGERS BUILDERS and DEVELOPMENT, LLC

Defendants,

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ROGERS BUILDERS and DEVELOPMENT, LLC

Third-Party Plaintiff,

-against-

BIG APPLE TESTING,

Third-Party Defendant

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ROGERS BUILDERS and DEVELOPMENT, LLC

Second Third-Party Plaintiff,

-against-

FINIX U.S.A. CONSTRUCTION INC.,

Second Third-Party Defendant

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The following papers numbered on this motion:

	NYSCEF Doc Numbers
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	77-79, 96, 118-120, 126-128, 144, 156-160
Answering Affidavit (Affirmation)	101-103, 105-107, 146-147, 149, 151-152, 154 162-165, 167-169, 177-179
Reply Affidavit (Affirmation)	111-114, 170-174, 175
Supplemental Affidavit (Affirmation)	
Pleadings –Exhibits	80-95, 108-110, 117, 121-123, 129-143, 153
Stipulations – Minutes	
Filed Papers	

This action arises from a construction accident in which Plaintiff fell while trying to climb onto a partially dismantled staircase collapsed at 1146 49th Street, Brooklyn, NY (the Premises).

Defendant 49-1146 LLC (Defendant 49-1146) owned the Premises and has defaulted in this action.

Defendant 49-1146 hired Defendant/Third-Party Plaintiff ROGERS BUILDERS and DEVELOPMENT, LLC (Defendant ROGERS) as the general contractor to renovate the Premises.

Defendant ROGERS also hired Third-Party Defendant BIG APPLE TESTING (Third-Party Defendant BIG APPLE) to inspect the underpinning and foundation at the Premises.

Third-Party Defendant BIG APPLE was Plaintiff's employer.

Plaintiff was an underpinning/foundation inspector employed by Third-Party Defendant BIG APPLE. On March 2, 2018, Plaintiff was at the Premises to inspect underpinning work that was ongoing in the basement. Plaintiff was injured when he

attempted to climb onto a partially demolished staircase in order to get to a bathroom on the first floor. The staircase was partially demolished to allow access to underpin the basement wall.

Plaintiff first climbed on an A-frame ladder that was leaned against the wall to reach the partially demolished staircase. When Plaintiff stepped onto the staircase from the ladder, the staircase collapsed causing him to fall to the basement floor.

Plaintiff's complaint alleges three causes of action: Labor Law § 240(1), Labor Law § 241(6), and Labor Law § 200.

Plaintiff moves for summary judgment against Defendant ROGERS on his claims pursuant to Labor Law § 240(1) and § 200.

Defendant ROGERS moves to dismiss Plaintiff's claims pursuant to Labor Law § 240(1), § 241(6) and § 200 and for summary judgment on its third-party claims for contractual indemnification and breach of contract against Third-Party Defendant BIG APPLE.

Third-Party Defendant BIG APPLE moved to dismiss Plaintiff's claims pursuant to Labor Law § 240(1), § 241(6) and § 200 and to dismiss Defendant ROGERS Third-Party complaint for common law indemnity and contribution, contractual indemnification, and breach of contract. Third-Party Defendant BIG APPLE also filed a cross-motion for the same relief in response to Plaintiff's motion.

Third-Party Defendant BIG APPLE's motion to dismiss Plaintiff's complaint and Defendant ROGERS Third-Party complaint (MS #6) must be denied as untimely pursuant to *Brill* (*see Brill v. City of New York*, 2 NY3d 648 [2004]), however its cross-motion (MS #7) for the same relief is timely.

Labor Law § 240(1)

Plaintiff argues that he was engaged in a covered activity and that the staircase was not an adequate safety device for the work in which he was engaged.

Defendant ROGERS argues that Plaintiff was not engaged in a protected activity at the time of his accident, that his work did not involve an elevation related risk, and that he was the sole proximate cause of his accident.

"'Labor Law § 240(1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites'" (*Bascombe v. West 44th Street Hotel, LLC*, 124 AD3d 812, 813 [2d Dept 2015], quoting *Probst v. 11 W. 42 Realty Invs., LLC,* 106 AD3d 711, 711 [2d Dept 2013]). "There must be a foreseeable risk of injury from an elevation-related hazard to impose liability under the statute, as '[d]efendants are liable for all normal and foreseeable consequences of their acts'" (*Shipkoski v. Watch Case Factory Associates*, 292 AD2d 587, 588 [2d Dept 2002], quoting *Gordon v. Eastern Ry. Supply,* 82 NY2d 555, 562 [1993]. "Thus, to establish a prima facie case pursuant to Labor Law § 240(1), a plaintiff must demonstrate that the risk of injury from an elevation-related hazard was foreseeable, and that an absent or defective protective device of the type enumerated in the statute was a proximate cause of the injuries alleged" (*id.*).

Here, Plaintiff was at the Premises to conduct an underpinning inspection in the basement level only. Plaintiff entered the Premises at the basement level which has its own entrance. Prior to commencing his inspection, Plaintiff asked to use the restroom.

Plaintiff asserts that he was told by one of the workers that the only restroom was on the first floor and the only way to access the first floor was by climbing the A-frame ladder to the partially demolished staircase.

Mendel Schwimmer the Project Manager for Defendant ROGERS testified that the water was shut off at the Premises, there was a Porta Potty in the front of the Premises, and the only interior door to the first floor was sealed shut so there was no interior access to the first floor. Defendant ROGERS submitted a receipt for a portable toilet at the premises covering the period February 8, 2018, through April 4, 2018, which included the date of the accident. Plaintiff denies that there were any portable toilets outside.

Plaintiff was not using the partially demolished stairs "'as a ladder, scaffold, hoist, or other safety device for the benefit of . . . his work'" (*Salcedo v. Swiss Ranch Estates, Ltd.*, 79 AD3d 843, 845 [2d Dept 2010], quoting *Donohue v. CJAM Assoc., LLC,* 22 AD3d 710, 712 [2005]). Rather, Plaintiff was attempting to use the partially demolished stairway as a passageway, not to access a work area but to use a bathroom. (*see Keenan v. Just Kids Learning Center*, 297 AD2d 708, [2d Dept 2002]). The staircase was not a passageway to any part of the worksite, as the work was solely in the basement.

Plaintiff's reliance on *Davis v. Columbia University,* 199 AD3d 481 (1st Dept 2019) is misplaced as the trial court decision (*Davis v Columbia University,* 2019 N.Y. Slip Op. 34319(U)) indicates in that case Plaintiff was returning to the work area from both obtaining material for his work and using the bathroom.

The partially demolished staircase was not a safety device provided for Plaintiff's work but a permanent part of the building. The bottom portion of the staircase was removed in order to allow the installation of the underpinning of the wall which the

staircase abutted. Thus, the condition of the staircase was a necessary part of the ongoing work.

"A plaintiff in a case involving collapse of a permanent structure must establish that the collapse was 'foreseeable,' not in a strict negligence sense, but in the sense of foreseeability of exposure to an elevation-related risk" (*Garcia v. Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 113 AD3d 494, 495 [2d Dept 2014]; quoting *Jones v. 414 Equities LLC*, 57 AD3d 65, 67 [1st Dept 2008]; *Mendoza v. Highpoint Asoc., IX*, LLC, 83 AD3d, 10-11 [1st Dept 2011]).

While there is a dispute as to whether the bathroom on the first floor was open and whether there was a portable toilet outside of the building, it was not foreseeable that Plaintiff would need a safety device to access the first floor of the premises as his work was solely in the basement which could be accessed from the outside.

Defendants did not violate Labor Law § 240(1) as the partially demolished stairs was not a safety device and Plaintiff did not require a stair or scaffold to perform his work.

For these reasons, that part of Plaintiff's motion for summary judgment on the issue of liability pursuant to Labor Law § 240(1) as against Defendant RODGERS must be denied and that part of Defendant ROGERS motion to dismiss Plaintiff's claims pursuant to Labor Law § 240(1) must be granted.

Labor Law § 241(6)

Defendant ROGERS moves to dismiss Plaintiff's claims pursuant to Labor Law § 241(6).

Plaintiff has plead violations of Industrial Code §§ 23-1.5(a) and (c)(1)(3); 23-1.7(b)(1) and (f); 23-1.15; 23-1.16; 23-1.17; 23-1.19; 23-1.21; 23-2.7(a-e); and 23-1.30.

Plaintiff concedes several of the pled violations but argues that §§ 23-1.7(f); 23-1.21(b)(4)(i); 23-1.21(e); and 23-2.7(a) and (b) are applicable.

However, these sections cited by Plaintiff are inapplicable. Section 23-1.7(f) deals with stairways to access other work areas and Plaintiff's work was exclusively in the basement. Sections 23-1.21(b)(4)(i) and 1.21(e) deal with ladders and Plaintiff's accident was caused by the stairs collapsing not a defect in the ladder. Section 23-2.7(a) & (b) are inapplicable as the condition of the stairs that caused Plaintiff's injury "was an integral part of the work being performed at the site of his accident" (*Dubin v. S. DiFazio and Sons Const., Inc.*, 34 AD3d 626, 627 [2d Dept 2006]; see *Lopez v. New York City Dept. of Environmental Protection*, 123 AD3d 982, 984 [2d Dept 2014]).

Defendant was not required to provide Plaintiff with a staircase to the first floor because his work was solely in the basement. Further, interior access to the first floor was not the only exit available to Plaintiff at the Premises. Plaintiff entered the Premises from the basement level entrance and therefore could exit that way as well.

Therefore, that part of Defendant ROGERS motion to dismiss Plaintiff's claims pursuant to Labor Law § 241(6) must be granted.

Labor Law § 200 and Common Law Negligence

Plaintiff moves for summary judgment against Defendant ROGERS on his claims pursuant to Labor Law § 200.

Defendant ROGERS moves to dismiss Plaintiff's claims pursuant to Labor Law § 200.

"Section 200 of the Labor Law is a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work" (*Zukowski v. Powell*

Cove Estates Home Owners Association, 187 AD3d 1099, 1101 [2d Dept 2020], quoting *Lombardi v. Stout,* 80 NY2d 290, 294 [1992]).

Labor Law § 200 cases fall into two categories: (1) those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and (2) those involving the manner in which the work is performed. Plaintiff argues that his accident arose from a dangerous condition at the premises.

However, as previously discussed, the state of the staircase was an integral and necessary part of the ongoing underpinning at the worksite, which Plaintiff was there to inspect (*see Sanders v. St. Vincent Hosp.*, 95 AD3d 1195 [2d Dept 2012]). The staircase was not intended nor needed as a passageway at the worksite as there was ingress and egress available through the basement level.

Further, it was not foreseeable or reasonable to expect that Plaintiff, or any person, would attempt to climb a staircase that was partially demolished where there was an alternate means to enter and leave the basement.

For these reasons, that part of Plaintiff's motion for summary judgment on the issue of liability pursuant to Labor Law § 200 as against Defendant RODGERS must be denied and that part of Defendant ROGERS motion to dismiss Plaintiff's claims pursuant to Labor Law § 200 must be granted.

Contractual Indemnification

Defendant ROGERS moves for summary judgment on its claim for contractual indemnification against Third-Party Defendant BIG APPLE.

Third-Party Defendant BIG APPLE cross-moves to dismiss Defendant ROGERS claim for indemnification.

"'The right to contractual indemnification depends upon the specific language of the contract'" (*Burgos v. 14 East 44 St., LLC*, 203 AD3d 688, 628-629 [2d Dept 2022], quoting *O'Donnell v. A.R. Fuels, Inc.*, 155 AD3d 644, 645 [2d Dept 2017]). "'The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances'" (*id.*, quoting *George v. Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]).

Here, the indemnification provision in the Rider of the subcontract between Defendant ROGERS and Third-Party Defendant BIG APPLE provides in part that the Subcontractor (BIG APPLE) agrees to indemnify, and defend and hold harmless from all costs including attorneys fee the Contractor (ROGERS) from claims arising out of or in connection with or as a result or consequence of the performance of the subcontract Work.

While Defendant ROGERS was not negligent and Plaintiff's claims against it must be dismissed, Defendant ROGERS is still entitled to recover from BIG APPLE any attorney's fees and other costs incurred in defense of this action pursuant to the indemnification provision of their contract.

Common Law Indemnification

Third-Party Defendant BIG APPLE cross-moves to dismiss Defendant ROGERS Third-Party complaint for common law indemnity and contribution.

Defendant ROGERS does not oppose that part of Third-Party Defendant BIG APPLE's cross-motion.

Therefore, that part of Third-Party Defendant BIG APPLE's cross-motion must be granted.

Breach of Contract/Failure to Procure

Defendant ROGERS moves for breach of contract against Third-Party Defendant BIG APPLE for failure to procure excess insurance coverage.

Third-Party Defendant BIG APPLE cross-moves to dismiss Defendant ROGERS Third-Party Complaint for breach of contract.

Defendant ROGERS established that Third-Party Defendant BIG APPLE failed to comply with its contractual obligation to obtain the excess insurance required under the contract.

Defendant ROGERS and Third-Party Defendant BIG APPLE's Contract Rider Agreement required to Defendant BIG APPLE to provide Defendant ROGERS Commercial General Liability coverage in the amount of $1,000,000/$2,000,000 as well as "Umbrella Liability Insurance with limits of $4,000,000 per occurrence and $4,000,000 in the aggregate for all coverages outlined in the Commercial General Liability, Automobile Liability Insurance and Employer's Liability Requirements".

Third-Party Defendant BIG APPLE failed to submit any evidence of an excess policy covering Defendant ROGERS for Plaintiff's accident.

Defendant ROGERS submitted a letter from Third-Party Defendant BIG APPLE's excess carrier that there is no excess coverage for ROGERS BUILDERS or BIG APPLE under the policy issued to BIG APPLE.

Therefore, that part of Defendant ROGERS motion must be granted, and that part of Third-Party Defendant BIG APPLE's cross-motion must be denied.

WHEREFORE, it is ORDERED that Plaintiff's motion for summary judgement is DENIED in its entirety; and it is further

ORDERED, that Defendant ROGERS is GRANTED summary judgment dismissing Plaintiff's Labor Law § 240(1), § 241(6), § 200, and common law claims as against it; and it is further

ORDERED, that Defendant ROGERS is GRANTED summary judgment on its third-party claims for contractual indemnification to the extent of any costs including attorneys fees incurred in defending this action; and it is further

ORDERED, that Defendant ROGERS is GRANTED summary judgment against Third-Party Defendant BIG APPLE on its third-party claims for breach of contract for failure to procure insurance; and it is further

ORDERED that that part of Third-Party Defendant BIG APPLE's motion to dismiss Defendant ROGERS Third-Party complaint for contractual indemnity and breach of contract is DENIED; and it is further

ORDERED that that part of Third-Party Defendant BIG APPLE's motion to dismiss Defendant ROGERS Third-Party complaint for common law indemnity and contribution is GRANTED.

This constitutes the decision and order of the Court.

ENTER,

J.S.C.